

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,360

MONROE T. PRATT,

v.

MONETTE PRATT,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
District of Columbia Circuit
FILED JUL 26 1956

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420

(i)

No. 13,360

APPELLANT'S STATEMENT OF QUESTION PRESENTED

Where after four years of separation, one spouse obtains a Limited Divorce on the ground of Desertion, can the other spouse, after the lapse of an additional year, show that the separation of the parties had been acquiesced in from the beginning by the first spouse, and obtain an Absolute Divorce on the ground of Five Years Voluntary Separation?

In other words, does the finding of Desertion in the first action preclude the finding of Five Years Voluntary Separation in the second proceeding?

Can these two grounds for divorce exist concurrently or are they mutually exclusive?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,360

MONROE T. PRATT,

Appellant

v.

MONETTE PRATT,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a Judgment entered by the United States District Court for the District of Columbia on March 28, 1956, dismissing Appellant's suit for Absolute Divorce on the ground of Five Years Voluntary Separation without Cohabitation. The jurisdiction of the District Court is based on Title 16-403 of the District of Columbia Code, 1951 Edition. This Court's jurisdiction is based upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

Monroe T. Pratt the Appellant, hereinafter referred to as the Husband, and Monette Pratt the Appellee, hereinafter referred to as the Wife, were married in the District of Columbia May 18, 1921. No children have been born of the marriage.

On June 2, 1948, the husband for reasons which to him seemed compelling left the jointly owned domicile at 770 Fairmont Street, N.W. in the District of Columbia and went to live elsewhere in the District. The wife was present at the time and offered no opposition to his departure (Tr. 5).

Sixteen days later on June 18, 1948, the husband filed suit in the District Court for a Limited Divorce claiming Constructive Desertion, Civil Action No. 2527-48. The wife denied the allegations of the Complaint and filed a Cross-Complaint for a Limited Divorce. This Complaint and Cross-Complaint were subsequently dismissed by mutual agreement, and the only pertinent aspect of the matter is that Paragraph No. 6 of the Answer read "Defendant admits the allegations contained in Paragraph No. 6 that no children were born as a result of this marriage, and states that there does not appear to be any possibility of Plaintiff and Defendant becoming reconciled." (Tr. 8)

In September, 1949, the husband, having been advised by his attorney that so long as he was a joint owner of the property at 770 Fairmont Street, N.W., he had a right to live there, called at the family domicile with a view to arranging with his wife to let him occupy a room in the house. The wife refused to admit him and told him to go see her lawyer. She had changed the lock on the door; hence his key would not open it. The following afternoon while his wife was at work he returned to the house and was admitted by his mother-in-law. He proceeded to remove the lock from the door and took it to a locksmith to have a key made. Upon his return to the house to replace the lock, his wife had arrived and ordered him to leave the premises. In a short time the police, who had presumably been summoned by his wife, arrived, but declined to take action against him when they learned that he was a joint owner of the house. In view of his wife's attitude and to avoid trouble, he departed (Tr. 7, 8, 9 and 10). The foregoing account is corroborated by John A. Jackson, a friend who accompanied the husband on these visits (Tr. 37, 38 and 39).

On March 15, 1950, the parties concluded a property settlement under which the wife paid the husband \$4564.75 for his interest in the jointly owned property at 770 Fairmont Street, N.W., where his wife has since continued to reside (Plaintiff's Exhibit No. 2) (Tr. 13).

On July 6, 1950, the husband filed a suit in District Court for Absolute Divorce on the ground of Constructive Desertion for Two Years, Civil Action No. 2874-50. The wife answered denying the allegations of the complaint and the suit was heard on April 9, 1952.

Plaintiff husband became confused on the witness stand, mixed his dates and contradicted himself, with the result that the Trial Judge became exasperated with his testimony, and without hearing corroborative witnesses or the Defendant, dismissed the Complaint and entered a Conclusion of Law "That the Plaintiff deserted the Defendant on June 2, 1948, and his desertion has continued without interruption to the present time." (App. 4)

On June 20, 1952, some four years after the separation of the parties had begun, the wife filed suit in District Court for a Limited Divorce on the ground of Two Years Desertion, Civil Action No. 2158-52. Shortly before this action came on for trial the husband filed a Motion for leave to amend his Answer by entering a Counter-Claim for Absolute Divorce on the ground of Five Years Voluntary Separation, the five year term having been completed since the original Answer was filed (App. 8 and 9). This Motion was denied as being too late, and the Wife's Complaint for Limited Divorce came on for trial in October, 1953.

The husband offered no testimony and the wife was granted a Limited Divorce on the ground of Two Years Desertion. Finding (c) of the Findings of the Fact read "The Defendant's desertion of the Plaintiff on, to wit, June 2, 1948, has continued for more than two years without interruption or cohabitation and until the present time. (App. 11)

The wife's prayer for separation maintenance, alimony and suit money were denied, it having been shown that the wife had permanent Civil Service status as an employee of the State Department, a salary in excess of \$3700.00 per year, and that she owned the house at 770 Fairmont Street, N.W., where she lived alone.

On November 17, 1953, the husband filed the present Complaint for Absolute Divorce on the ground of Five Years Voluntary Separation, Civil Action No. 5322-53. The husband testified that since the original separation on June 2, 1948, the wife had never gotten in touch with him, never came to see him, nor written him, nor telephoned him (Tr. 14). No testimony was offered by the Defendant wife. The Court, however, despite the undisputed proof that the wife had acquiesced in the separation since its inception, dismissed the Complaint for the reason that it felt bound by the previous finding in No. 2158-52 that the husband had deserted the wife and that this desertion had continued down to the date of the trial of that case in October, 1953, and the Court could not grant the husband's prayer for divorce on the ground of Five Years Voluntary Separation because that would conflict with the previous finding of desertion, and that these two grounds for divorce were irreconcilable.

STATEMENT OF POINTS

The Court erred in holding that the finding in the Wife's suit for Limited Divorce, No. 2158-52, that the desertion of the wife by the husband had continued down to the time of the trial of that suit was res judicata as to the nature of the separation of the parties down to that point, and precluded the Court from finding in the present suit that the separation of the parties had been voluntary in the legal sense by reason of the fact that the wife had acquiesced in the separation from its beginning.

SUMMARY OF ARGUMENT

Desertion for two years and voluntary separation for five years as grounds of divorce in the District of Columbia are not mutually exclusive but may exist concurrently, the longer term embracing the shorter term.

ARGUMENT

This childless marriage has not existed as a reality for more than eight years. In prior litigation between these parties, it has been held that the Appellant husband deserted the wife on June 2, 1948; but the wife's acquiescence in the separation throughout its duration is indicated by the fact that she interposed no objection at the time of the husband's departure, and that during the eight years of the separation she has not communicated with him in any way whatsoever, despite the fact that they have both continued to reside in the District of Columbia and have occasionally encountered one another in the street cars or buses. Moreover, she has taken aggressive steps to maintain the separation. In September, 1949, when the husband sought to occupy a room in the jointly owned home, the wife refused him admittance, and when he again returned she called on the police to eject him. Thereafter, in order to make sure that he would not assert his legal right to live in his own house, she purchased his interest in the property. Finally, in June, 1952, she filed an action for Limited Divorce, which was granted.

The only reason the wife clings to this empty shell of marriage is a mercenary one. She was denied alimony and suit money in her action for Limited Divorce because her financial situation was shown to be superior to that of the husband, but if she outlives the husband while still technically married to him, she hopes to succeed to one or both of the small pensions he receives for total disability; one of \$66.00 a month which he receives as a veteran of World War I, and one of \$69.00 a month which he receives from the Pullman Company. Also, she believes that she may be able to

claim a dower interest in a doubtful equity which the husband owns in a house subject to two mortgages.

Certainly this is a case which falls within the principle enunciated by this Court that "Where a separation has continued more than five years and neither party has tried to end it, a divorce should be granted."

Buford v. Buford, 81 U.S. App. D.C. 169, 156 F.2d 567.

The case presents no factual problem, but only a technical legal one.

"The Court: 'On the evidence, Mr. Handwerk (Attorney for Plaintiff) I don't think you need argue that point. The only question, as I see it, is whether this Judgment of the 2nd day of November, 1953, awarding Monette Pratt a Limited Divorce on the ground of Desertion of more than two years interrupts or prevents the running of the five year separation.' " (Tr. 53)

"The Court: 'I would have no difficulty, Mr. Handwerk, if it were not for this finding and Judgment in these prior cases.' " (Tr. 87)

"The Court: 'Factually, I would have no difficulty, but right now this Court has to decide contrarily to the facts as presented to me that there was desertion, which does not connote voluntary separation even if liberally construed.' " (Tr. 88)

"The Court: 'I will tell you, Mr. Handwerk, I cannot set aside the rule of law of the conclusive effect of the doctrine of res judicata, and that being so, I find that you have not established for the requisite five years a voluntary separation, the finding in the preceding case of desertion being within the five year period.' " (Tr. 105)

It is the Appellant's belief that the legal difficulty which presented itself to the Trial Court's mind is an insubstantial one.

The District Code provides that when a desertion occurs, the deserted party's only remedy during the first two years of desertion is an action for separate maintenance.

After the lapse of two years the deserted party may obtain either a Limited Divorce or an Absolute Divorce.

After the lapse of an additional three years either party may obtain a Limited Divorce or an Absolute Divorce if it be shown that throughout the five year period both parties acquiesced in the separation, even though the original cause of the separation was desertion.

These causes of action are not mutually exclusive; they are complementary; they exist concurrently and consecutively.

With the present parties, the wife waited some four years after the husband's desertion and then brought a suit for a Limited Divorce. Shortly before the wife's suit came on for trial the husband sought to amend his Answer by filing a counter-claim for Absolute Divorce on the ground of five years voluntary separation, the five year term having only then reached completion. This motion was opposed and was denied.

At the trial of the wife's case the Defendant offered no testimony, believing that the granting of the wife's prayer for a Limited Divorce would create no difficulty in his own suit for Absolute Divorce soon to be filed.

Would it have been possible for the husband to have defeated the wife's suit for Limited Divorce on the ground of Desertion by proving at the trial that she had acquiesced in the separation from the beginning? We do not believe so. For the wife's right of action subsisted regardless of the fact that the right of action on the ground of five years voluntary separation was accruing and overlapping it. By the same reasoning, the finding in the wife's suit for Limited Divorce that the husband's desertion continued down to the time of the trial on November 2, 1953, should not preclude the granting of an Absolute Divorce to the husband on his showing that the wife had acquiesced in the separation for a period of more than five years.

Appellant finds support for his rationale of the divorce law in Parks v. Parks, 73 App. D.C. 93, 116 F.2d 556. In the Parks case, the date of the husband's desertion was fixed as of April 18, 1932. On April 14, 1934, the wife filed an action for Limited Divorce on the ground of desertion. This case was tried and a decree for Limited Divorce entered on May 8, 1935. On May 16, 1938, the husband filed a suit for Absolute Divorce on the ground of five years voluntary separation and was granted a decree which this Court sustained.

Obviously the five year period of separation on which the husband relied embraced a portion of the same period on which the wife relied in her suit for Limited Divorce on the ground of Desertion.

The lower Court distinguished the Parks case from the present one in that there was no specific finding in the Parks suit for Limited Divorce that the desertion of the husband had continued down to the date of the decree, whereas in the present case the Court had found in the wife's suit for Limited Divorce that the husband's desertion had continued down to the date of the decree, November 2, 1953.

Appellant submits that this differentiation of the two cases is an artificial one. It is true that the Parks case for Limited Divorce was filed before the 1935 amendment of the divorce law of the District and the law as it then stood did not require that desertion continue for a stated period before a Decree of Limited Divorce could be obtained. It seems obvious, however, that if at the time of the trial of Mrs. Parks' Limited Divorce case in May, 1935, the Desertion on which it was grounded has been condoned, or if it had ceased to exist the Decree would not have been entered. It seems fairly obvious, therefore, that implicit in the granting of the Limited Divorce decree in May, 1935, was the fact that the Desertion of the husband had continued to that date.

CONCLUSION

Appellant submits that desertion for two years and voluntary separation for five years as grounds for divorce can exist concurrently, the five year period overlapping the two year period, and that in the present case the Trial Court erred in holding that the two causes of action are mutually exclusive and that the finding of desertion in the Appellee's case for Limited Divorce is res judicata of the claim of voluntary separation in the present case.

JOHN R. WALKER

815 Fifteenth Street, N. W.
Washington, D. C.

Attorney for Appellant

(i)
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APPENDIX
PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

118 [Filed July 6, 1950]

MONROE T. PRATT
1302 R. I. Ave. N.W.

Plaintiff.

vs.

Civil Action No. 2874-50

MONETTA PRATT
770 Fairmont St. N.W.

Defendant.

COMPLAINT FOR DIVORCE

The Complaint of Monroe T. Pratt, states to the Court as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia and has been for more than Two Years prior to this suit.
2. That the Defendant is a citizen of the United States and a resident of the District of Columbia.
3. That the Plaintiff and Defendant were married May 18, 1921 in the District of Columbia, and lived as man and wife until June 2, 1948, when the Defendant deserted him and has not lived or cohabited as man and wife since. That he made an effort to reconcile their marriage and Defendant called the Police to put him out of the house. That since the desertion, he has lived at 148 R. St. N.W., and 1302 Rhode Island Ave. N.W., and the Defendant has lived at 770 Fairmont Street, N.W.; that no children were born of said marriage, and all property rights have been settled between the parties. That the Defendant is employed in the State Department here as a Clerk, and that he is retired from the Government.

WHEREFORE, the premises considered, the Plaintiff prays:

1. That process issue.
2. That upon Final Hearing, he be granted an Absolute Divorce

from the Defendant.

3. And for such other and further relief as to the Court may seem proper and just.

/s/ Monroe T. Pratt
Plaintiff.

119

DISTRICT OF COLUMBIA, SS:

Monroe Pratt, being first duly sworn upon Oath deposes and says that, he has read the above Complaint by him subscribed and knows the contents thereof; that the allegations therein contained of his personal knowledge are true and those made upon information and belief, he believes and avers to be true.

/s/ Monroe T. Pratt
Plaintiff July

Subscribed and sworn to before me this day 1 ~~June~~ 1950.

/s/ illegible
Notary Public

Ernest C. Dickson
903 You Street, N.W.
Washington, D.C.
Attorney for Plaintiff.

120 [Filed July 24, 1950]

ANSWER

For answer to the Bill of Complaint exhibited against him the defendant, Monetta Pratt, states to the Honorable Court as follows:

1. 2. She admits the allegations contained in paragraphs (1) and (2).
3. She admits as to the date of marriage but denies every other allegation in paragraph 3.

WHEREFORE, the premises considered, the defendant prays that:

1. The Complaint herein filed be dismissed.
2. That she be granted alimony pendente lite.
3. That she be given an accounting concerning the sale of property which was formerly jointly owned by plaintiff and defendant.

/s/ Monette Pratt

DISTRICT OF COLUMBIA, ss:

I, Monetta Pratt, being first duly sworn on oath depose and say that I have read the foregoing Answer by me subscribed and know the contents thereof; that the matters and things stated therein as true are true and that these stated on information and belief I believe to be true.

/s/ Monette Pratt

121 Subscribed and sworn to before me this 22nd day of July,
1950.

/s/ Manuel C. Avancena

Notary Public, D.C.

My Commission Expires Nov. 30, 1954.

(Certificate of Service)

122 [Filed April 28, 1952]

FINDINGS OF FACT

This cause having come on for trial upon the Complaint and Answer, and the Court having heard the testimony of the plaintiff, the Court this 28th day of April, 1952, makes the following findings of fact:

(a) That the plaintiff and the defendant were lawfully married in the District of Columbia on May 18, 1921, and of said marriage no children have been born.

(b) That the plaintiff and the defendant are bona fide residents of the District of Columbia, and have been for more than two years prior to the filing of the Complaint herein, and in fact since at least 1923.

(c) That the plaintiff separated himself from the defendant on, to-wit, June 2, 1948.

(d) That the plaintiff thereafter did not make any bona fide effort to reconcile with the defendant.

(e) That the plaintiff's testimony, candor and demeanor as a witness, were highly unsatisfactory to the Court.

/s/ Edward M. Curran

U.S. District Judge

(Certificate of Service)

123 [Filed April 28, 1952]

CONCLUSIONS OF LAW

The Court having heretofore entered its Findings of Fact in this cause, the Court states the following Conclusions of Law; this 28th day of April, 1952:

(a) That the plaintiff deserted the defendant on June 2, 1948, and his desertion has continued without interruption until the present time.

(b) That the plaintiff's Complaint must be dismissed.

/s/ Edward M. Curran

U.S. District Judge

(Certificate of Service)

124 [Filed April 28, 1952]

JUDGMENT DISMISSING COMPLAINT AND AWARDING FEE

Upon consideration of the Findings of Fact and Conclusions of Law heretofore entered in this cause, it is by the Court this 28th day of April, 1952:

ORDERED, ADJUDGED, and DECREED:

1. That the plaintiff's Complaint be, and the same hereby is, dismissed.

2. That the plaintiff, Monroe T. Pratt, be, and he hereby is, directed to pay to John Alexander, attorney for the defendant, the sum of Two Hundred (\$200.00) Dollars as a counsel fee for his services herein to the defendant, and that the plaintiff shall pay the taxable costs of this proceeding.

/s/ Edward M. Curran

U. S. District Judge

(Certificate of Service)

125 [Filed May 14, 1952]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONETTE PRATT,
770 Fairmont Street, N.W.
Washington, D. C.
Plaintiff,

vs.

Civil Action No. 2158-52

MONROE T. PRATT,
1609 "O" Street, N.W.
Washington, D. C.
Defendant.

COMPLAINT FOR LIMITED DIVORCE AND/OR
SEPARATE MAINTENANCE
(Desertion)

The Complaint of Monette Pratt, respectfully shows to the Court as follows:

1. That she is an adult citizen of the United States and an actual bona fide resident of the District of Columbia, having been such resident for more than two years prior to the institution of this suit, which is filed herein in her own right, and since the separation of the parties hereto, the plaintiff has resided at 770 Fairmont Street, Northwest, in the District of Columbia.

2. That the defendant, Monroe T. Pratt, is likewise an adult citizen of the United States and a bona fide resident of the District of Columbia; and that since the separation of the parties hereto, the defendant has resided at 148 "R" Street, Northwest for three months; at 1302 Rhode Island Avenue, Northwest, and at 1609 "O" Street, Northwest, in the District of Columbia.

3. That heretofore, on, to-wit, May 18, 1921, the plaintiff and the defendant, Monroe T. Pratt, were lawfully married in the District of Columbia, and of said marriage no children have been born.

126 4. That subsequent to the marriage of the parties hereto they lived and cohabited together as husband and wife, until, to-wit, June 2, 1948,

when the defendant, Monroe T. Pratt, deserted the plaintiff while they were living at 770 Fairmont Street, Northwest in the District of Columbia, and said desertion has continued without interruption or cohabitation, and until the present time.

5. That the defendant, Monroe T. Pratt, has treated plaintiff with extreme cruelty which she has not forgiven or condoned; that said cruelty has destroyed the purpose of the marriage of the parties hereto, has caused the plaintiff to become highly nervous, distressed and ill; that the continuation of said cruelty adversely affected the health of the plaintiff, rendering further or continued cohabitation with the defendant intolerable and prejudicial to her bodily health; and that as a result of said cruelty shown the plaintiff by the defendant, there is no possibility of a reconciliation between the parties.

6. Plaintiff avers that the defendant, Monroe T. Pratt, has failed and refused, and continues to fail and refuse, to support and maintain the plaintiff, although well able so to do.

7. That plaintiff believes that there may be property rights involved, but lacks sufficient information regarding the facts, at this time.

WHEREFORE, the premises considered, plaintiff prays the judgment of this Court:

1. That she be awarded a limited divorce from the defendant, Monroe T. Pratt, on the ground of two years' desertion, and/or separate maintenance for herself.

2. That the plaintiff be awarded alimony both pendente lite and permanently, from the defendant, Monroe T. Pratt, for her support.

127 3. That, pendente lite and permanently, the plaintiff be awarded suit money, including counsel fees, and costs.

4. And for such other and further relief as the nature of the case may require, and to the Court may seem just and proper.

/s/ Monette Pratt

/s/ John Alexander
Attorney for the Plaintiff

* * *

DISTRICT OF COLUMBIA, SS:

MONETTE PRATT, being first duly sworn on oath, according to law, deposes and says: That she has read the foregoing Complaint by her subscribed; and that she verily believes the statements made therein to be true.

/s/ Monette Pratt

Subscribed and sworn to before me this
12th day of May 1952.

/s/ Dolores Dahl
Notary Public, D. C.

My Commission Expires: 1/14/53.

128 [Filed July 18, 1952]

ANSWER OF DEFENDANT TO COMPLAINT FOR LIMITED
DIVORCE AND TO MOTION FOR ALIMONY, ETC.,
PENDENTE LITE

Comes now the Defendant, Monroe T. Pratt, by counsel, and answers the Complaint for Limited Divorce filed herein as follows:

Article 1. Admitted.

Article 2. Admitted.

Article 3. Admitted.

Article 4. Defendant admits that the Parties separated at the time and place alleged, but denies that he deserted the Plaintiff.

Article 5. Defendant denies that he has at any time treated the Plaintiff with cruelty, and on the contrary avers that Plaintiff's conduct toward him was such as to make continued co-habitation between them impossible; and he admits that there is no possibility of a reconciliation between them.

Defendant further avers that regardless of which of the parties may have been primarily responsible for the separation of June 2nd, 1948, both parties have acquiesced in such separation, and that it is in effect a voluntary separation.

Article 6. Defendant avers that the Plaintiff was self-supporting at the time of her marriage to the Defendant; that she continued to be self-

supporting during the time they lived together and down to the present time; that her income equals or exceeds that of the Defendant; that the Defendant's income consists almost entirely of pensions which he receives by reason of his total disability, and that he is unable to contribute to the
 129 support of the Plaintiff, and that he is under no moral or legal obligation to do so.

Article 7. Admitted.

WHEREFORE, the premises considered, Defendant prays that the Complaint be dismissed.

/s/ John R. Walker

Attorney for Defendant * *

(Certificate of Service)

[Filed Aug. 4, 1953]

MOTION FOR LEAVE TO AMEND ANSWER

Comes now the Defendant, Monroe T. Pratt, by his Attorney, and moves the Court for leave to amend the Answer heretofore filed herein by the Defendant by entering the Counter-Claim set forth in the Annexed Amended Answer, which by reference is hereby made a part hereof; and for reason therefor shows:

That since the filing of the Plaintiff's Complaint herein, the voluntary separation of the parties hereto has attained a duration in excess of five years.

/s/ John R. Walker
 Attorney for Defendant

(Certificate of Service)

AMENDED ANSWER AND COUNTER-CLAIM

Comes now the Defendant, Monroe T. Pratt, and amends the Answer heretofore filed by him herein by adding thereto the following Counter-Claim.

1. In June, 1948, the parties hereto, while residing at 770 Fairmont Street, N.W., in the District of Columbia, voluntarily separated and have resided separate and apart from one another without cohabitation

since the said date down to the date of the filing of this Amended Answer.

2. Since the time of the said voluntary separation Defendant has resided at 148 R Street, N.W., 1302 Rhode Island Avenue, N.W., and 1609 O Street, N.W., all in the District of Columbia, and the Plaintiff has resided at 770 Fairmont Street, N.W., Washington, D.C.

3. On or about March 15th, 1950, a property settlement was effected by the parties hereto and there are no property rights to be adjudicated in this proceeding.

4. There is no likelihood of a reconciliation between the parties.

WHEREFORE, the premises considered, the Defendant prays that he be granted a divorce a vinculo matrimonii from the Plaintiff on the ground of five years voluntary separation, and that the Plaintiff's Complaint be dismissed.

/s/ Monroe T. Pratt

/s/ John R. Walker,
Attorney for Defendant
* * *

DISTRICT OF COLUMBIA, ss:

MONROE T. PRATT, being first duly sworn on oath according to law, deposes and says that he has read the foregoing Answer and Counter-Claim by him subscribed, and that he verily believes the statements made therein to be true.

/s/ Monroe T. Pratt

Subscribed and sworn to before me this 20th day of July 1953.

/s/ Vera McG. Simpson
Notary Public, D.C.

[Filed Aug. 17, 1953]

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
FOR LEAVE TO AMEND ANSWER**

Now comes the plaintiff herein, by her attorney, and in opposition to the defendant's motion for leave to amend the answer heretofore filed by the defendant, shows to the Court as follows:

1. The proposed amendment does not relate back to the answer previously filed in this cause by the defendant on July 18, 1952 over one year ago, but endeavors to set forth for the first time a counterclaim against this plaintiff, and a claim which on its face did not arise until June, 1953! Plainly this does not constitute a proper amendment but an entirely new action.

2. To allow the so called amendment would be contrary to justice, in that this cause would not then be calendared for trial until sometime in September, 1953, fourteen months after its calendar date at present.

3. Plaintiff will be injured by allowing the amendment, while the defendant will not be injured by denying leave to amend. Here plaintiff seeks only a limited divorce. If the claim asserted by the defendant is true and well founded, he can defeat this action by plaintiff, and obtain the relief he seeks in an independent proceeding which he can file now without leave of Court.

4. This Court has decided in General Term not to allow an after occurring cause for an absolute divorce to be joined with an earlier calendared case for a limited divorce, and thereby obtain an advanced position upon the trial calendar.

5. It is contrary to the policy of the Court, as determined in General Term, to allow the filing of supplemental claims for divorce, under the circumstances and for the reasons set forth in 4 above.

/s/ John Alexander

Attorney for the Plaintiff

* * *

(Certificate of Service)

ORDER

Upon consideration of the defendant's Motion for Leave to Amend Answer, and after hearing had thereon, it is by the Court this 26th day of September, 1953,

ORDERED:

1. That the defendant's motion for leave to amend answer, be, and

the same hereby is, denied.

/s/ F. Dickinson Letts
U. S. District Judge

(Certificate of Service)

130 [Filed Nov. 2, 1953]

FINDINGS OF FACT

Upon consideration of the pleadings filed herein, the testimony adduced in open Court, the record in Civil Action No. 2874-50 in this Court between these parties, and the arguments of counsel, the Court makes the following Findings of Fact this 2nd day of November, 1953:

(a) That the plaintiff and the defendant were lawfully married in the District of Columbia on May 18, 1921, and of said marriage no children have been born.

(b) That the plaintiff is a bona fide resident of the District of Columbia, and has been for more than two years prior to the filing of her complaint herein.

(c) That the defendant's desertion of the plaintiff on, to-wit, June 2, 1948, has continued for more than two years without interruption or cohabitation and until the present time.

(d) That the plaintiff, at trial, abandoned her alternative claims in this action for separate maintenance or alimony.

(e) That the defendant, at trial, presented no testimony or evidence.

/s/ Walter M. Bastian
U. S. District Judge

(Certificate of Service)

131 [Filed Nov. 2, 1953]

CONCLUSIONS OF LAW

The Court having heretofore entered its Findings of Fact in this cause, the Court states the following Conclusions of Law, this 2nd day of November, 1953:

(a) That the Court in this action is bound by the findings of fact, conclusions of law, and judgment entered by the Court in Civil Action

No. 2874-50, an action between the same parties.

(b) That the plaintiff is entitled to a limited divorce on the grounds of two years desertion without interruption or cohabitation.

(c) That the plaintiff's prayers for separate maintenance, alimony, and suit money, should be denied.

/s/ Walter M. Bastian

U. S. District Judge

(Certificate of Service)

132 [Filed Nov. 2, 1953]

JUDGMENT

Upon consideration of the record herein, and the Court having heretofore entered its Findings of Fact and Conclusions of Law in this cause, it is by the Court this 2d day of November 1953:

ORDERED, ADJUDGED and DECREED:

1. That the plaintiff, Monette Pratt, be, and she hereby is, awarded a divorce a mensa et thoro from the defendant Monroe T. Pratt on the ground of desertion for two years.

2. That the plaintiff's prayers for separate maintenance or alimony, and for suit money, be, and the same hereby are, denied.

/s/ Walter M. Bastian

U. S. District Judge

(Certificate of Service)

133 [Filed Jan. 29, 1954]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

MONROE T. PRATT
1609 O Street, N.W.
Washington, D.C.

Plaintiff

vs.

MONETTE PRATT
770 Fairmont Street, N. W.
Washington, D.C.

Defendant

Civil Action No. 5322-53

AMMENDED COMPLAINT FOR ABSOLUTE DIVORCE
FOR FIVE YEARS VOLUNTARY SEPARATION

The Complaint of the Plaintiff, Monroe T. Pratt, respectfully shows to the Court as follows:

1. He is an adult citizen of the United States and a resident of the District of Columbia, having been such a resident for more than two years prior to the filing of this suit.

2. The Defendant, Monette Pratt, is an adult citizen of the United States and a resident of the District of Columbia, and now resides at 770 Fairmont Street, N.W. in the District of Columbia, where she has resided continuously since the separation of the parties hereinafter set forth.

3. The Plaintiff and the Defendant were lawfully married in the District of Columbia on May 18th, 1921; no children have been born of the marriage; and there are no property rights to be settled between the parties.

4. Because of unpleasant home conditions and unhappy differences between the parties, Plaintiff, with the tacit consent of the Defendant, left the domicile at 770 Fairmont Street, N.W. on June 2, 1948, and removed to 148 R Street, N.W. in the District of Columbia, where he
134 resided until February 11, 1949, when he removed to 1302 Rhode Island Avenue, N.W. in the District of Columbia, where he resided until June 1,

1950, when he removed to 1609 O Street, N.W. in the District of Columbia, where he has continued to reside down to the time of the filing of this Amended Complaint.

5. The separation of the parties has been continuous and uninterrupted since June 2, 1948, down to the time of the filing of this Amended Complaint; there has been no cohabitation between the parties during the period; and there is no likelihood of a reconciliation between them. This separation has been acquiesced in by the Defendant and constitutes five years voluntary separation of the parties.

WHEREFORE, the premises considered, the Plaintiff prays that he be granted a Divorce a vinculo matrimonii from the Defendant on the ground of five years voluntary separation, and for such other and further Order as to the Court may seem just and proper.

/s/ Monroe T. Pratt

/s/ John R. Walker
Attorney for Plaintiff

* * *

DISTRICT OF COLUMBIA, ss:

MONROE T. PRATT, being first duly sworn on oath according to law, deposes and says that he has read the foregoing Complaint by him subscribed, and that he verily believes the statements made therein to be true.

/s/ Monroe T. Pratt

Subscribed and sworn to before me this 29th day of January 1954.

/s/ Vera McG. Simpson
Notary Public, D.C.

(Certificate of Service)

136 [Filed Mar. 24, 1954]

DEFENDANT'S ANSWER TO AMENDED COMPLAINT
(Absolute Divorce - Five Years' Voluntary Separation)

Now comes the defendant, Monette Pratt, and in answer to the allegations contained in the amended complaint herein, shows to the Court

as follows:

1, 2 and 3. Defendant admits the allegations of paragraphs one, two and three of the complaint.

4. Defendant denies that the plaintiff left with the tacit consent of the defendant, on June 2, 1948, and alleges that as found in Civil Action No. 2874-50 and in Civil Action No. 2158-52, found in this Court, the plaintiff deserted the defendant without just cause or excuse on June 2, 1948. Defendant neither admits nor denies the allegations as to plaintiff's place of residence because she lacks sufficient knowledge or information, therefore, will demand strict proof of these allegations.

5. The defendant admits that the parties have been separated continuously since June 2, 1948 as the result of the plaintiff's desertion of defendant; the defendant admits that there is now no likelihood of a reconciliation between them at this time; that on the second or third occasion when the plaintiff returned to the former domicile of the parties at 770 Fairmont Street, N.W., Washington, D.C., where the defendant continued to and still does reside since his desertion of her in June, 1948 and the Fall of 1950, the defendant asked the plaintiff to return to live with her, but he refused; that in September, 1950 the plaintiff broke into the house on one occasion and so conducted himself as to cause the defendant to fear him, and she was required to call the police; that since September, 1950 the defendant has been afraid and unwilling to resume cohabitation with the plaintiff; and that accordingly, the defendant denies that the separation has been acquiescent by the defendant for five years prior to the filing of this suit and denies that the separation constitutes five years' voluntary separation by the parties.

That the plaintiff has failed and refused and continues to fail and refuse to support and maintain the defendant, although he is well able so to do.

WHEREFORE, the premises considered, the defendant prays:

1. That the amended complaint be denied and that she be awarded maintenance for her support.

2. That pendente lite and permanently she be awarded alimony and suit money including counsel fees.

3. And for such other and further relief as the nature of the case may require and to the Court may seem just and proper.

/s/ Monette Pratt

/s/ John Alexander,
Attorney for the Defendant

* * *

DISTRICT OF COLUMBIA, SS:

MONETTE PRATT, being first duly sworn on oath, according to law, deposes and says: that she had read the foregoing Answer, by her subscribed; and that she verily believes the statements made therein to be true.

/s/ Monette Pratt

Subscribed and sworn to before me, this 23rd day of March, 1954.

/s/ Chalmers F. Groff

My Commission Expires:

Notary Public, D.C.

June 1, 1958.

(Certificate of Service) _____

139 [Filed Mar. 28, 1956]

FINDINGS OF FACT

Upon consideration of the pleadings filed herein, the testimony ad-
duced in open Court and oral stipulations, the defendant not taking the
stand to testify in her own behalf, the records in Civil Actions Nos. 2874-
50 and 2158-52 in this Court between these parties, and the arguments of
counsel, the Court makes the following Findings of Fact this 28th day of
March, 1956,

(a) That the plaintiff and the defendant were lawfully married in
the District of Columbia on May 18, 1921, and of said marriage no child-
ren have been born.

(b) That the plaintiff, Monroe T. Pratt, and the defendant, Monette
Pratt, are bona fide residents of the District of Columbia, and have been
for more than two years prior to the filing of the Complaint herein.

(c) That the plaintiff, Monroe T. Pratt, has failed to establish that the parties have been voluntarily separated for more than five years prior to the filing of his complaint.

(d) That the plaintiff left the defendant on June 2, 1948 and has not lived or cohabited with her since that time. That in Civil Action No. 2158-52 it was found on November 2, 1953, that the desertion of the defendant herein by the plaintiff herein on to-wit June 2, 1948 "has continued for more than two years without interruption or cohabitation and until the present time". That the instant suit was filed on the 17th day of November, 1953, praying for an absolute divorce on the ground of five year voluntary
140 separation. That the defendant submitted no testimony in her defense, relying upon the findings, conclusions and judgments in Civil Action No. 2874-50 and No. 2158-53.

(e) That the plaintiff is the true owner of the equity in premises 1609 O Street, N.W., Washington, D.C., title to which is in John A. Jackson, a straw party; that plaintiff receives gross rents from said property of \$170.00 per month, from which he pays \$64.00 monthly (including \$12.00 realty taxes) on the first trust, and \$30.00 per month on the second trust, with balances of \$7,000.00 and \$1,000.00 respectively, and pays utilities and maintenance charges; and that the plaintiff herein receives a pension of \$69.00 per month from Pullman Company; and receives \$66.00 a month as a gratuity from the United States Veterans Administration for total disability as a veteran.

That the defendant is the present owner of the equity in 770 Fairmont Street, N.W., Washington, D.C. and has been since a settlement upon said property on, to-wit, March 15, 1950, when she paid the sum of \$4564.75 cash to plaintiff as his interest therein. That defendant is employed by the United States State Department at an annual gross salary of \$3700.00.

(f) That the defendant, at the trial, withdrew her prayer for permanent alimony.

/s/ David A. Pine
U. S. District Judge

No objection as to form:
Robert C. Handwerk
Atty. for Plaintiff

141 [Filed Mar. 28, 1956]

CONCLUSIONS OF LAW

The Court having heretofore entered its Findings of Fact in this cause, the Court states the following Conclusions of Law, this 28th day of March, 1956,

(a) That the Court in this action is bound by the Findings of Fact, Conclusions of Law, and Judgment entered by the Court in Civil Action No. 2158-52, an action between the same parties.

(b) That the plaintiff, Monroe T. Pratt, has failed to sustain the burden of proof on the allegations of his complaint herein, and the same should be denied.

(c) That defendant's attorney is entitled to an award of counsel fees for his services herein to the defendant.

/s/ David A. Pine
U. S. District Judge

No objection as to form:

Robert C. Handwerk
Atty. for Plaintiff

142 [Filed March 28, 1956]

JUDGMENT

Upon consideration of the record herein, and the Court having hereto entered its Findings of Fact and Conclusions of Law in this cause, it is by the Court this 28th day of March, 1956,

ORDERED, ADJUDGED and DECREED:

1. That the complaint herein of the plaintiff, Monroe T. Pratt, for absolute divorce on the ground of five years voluntary separation be, and the same hereby is, dismissed.

2. That the plaintiff, Monroe T. Pratt, be, and he hereby is, directed to pay to John Alexander, attorney for the defendant, the sum of Two Hundred (\$200.00) Dollars as a counsel fee on account of his services herein to the defendant.

/s/ David A. Pine
U. S. District Judge

(Certificate of Service)

* * *

143 [Filed April 7, 1956]

NOTICE OF APPEAL

Notice hereby given this 7th day of April 1956, that Monroe T. Pratt, plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 28th day of March, 1956, in favor of defendant, Monette Pratt, against said plaintiff.

/s/ Robert C. Handwerk
Attorney for Appellant
Monroe T. Pratt
815-15th St. N.W.
Washington 5, D.C.

mail copy to

John Alexander, Esq.
Woodward Bldg.
Washington 5, D.C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

1st District of Columbia Circuit

FILED

SEP 26 1956

Joseph W. Stewart

CLERK

No. 13,360

MONROE T. PRATT,

Appellant,

VS.

MONETTE PRATT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES K. HUGHES
JOHN ALEXANDER

630 Woodward Building
Washington 5, D. C.

Attorneys for Appellee

(i)

No. 13,360

APPELLEE'S STATEMENT
OF QUESTIONS PRESENTED

Appellee adopts the Appellant's Statement of
Questions Presented.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,360

MONROE T. PRATT,

Appellant,

vs.

MONETTE PRATT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The parties separated on June 2, 1948. On June 18, 1948 the husband filed a suit for a limited divorce claiming desertion. That suit was dismissed subsequently by agreement.

On July 6, 1950 the husband filed a second suit, seeking an absolute divorce on two years' desertion (J.A. 1). After trial his complaint was denied on April 28, 1952, the court concluding "that the plaintiff deserted the defendant on June 2, 1948 and his desertion has continued without interruption and until the present time" (J.A. 4).

On June 20, 1952, the wife sued for a limited divorce on the ground of two years' desertion (J.A. 5). Defendant answered contending that the separation was "in effect a voluntary separation" (J.A. 7). Following trial, judgment was entered on November 2, 1953 awarding the wife a limited divorce from the defendant on the ground of two years'

desertion. This judgment was supported by a finding of fact that "defendant's desertion of the plaintiff on to-wit June 2, 1948 has continued for more than two years without interruption or cohabitation and until the present time" (J.A. 11 and 12).

Two weeks later the husband filed the present suit on November 14, 1953 alleging that the parties separated on June 2, 1948 and that the separation of the parties "has been acquiesced in by the Defendant and constitutes five years voluntary separation of the parties" (J.A. 14). The defendant wife answered denying that the separation had been with the tacit consent of herself, denying that the separation had been acquiesced in, and denying that the separation constitutes five years voluntary separation by the parties. She specifically pleaded the judgment records in the last two prior cases between the parties (J.A. 14 and 15).

At the trial of this case the wife introduced the record of the two prior cases, Civil Action No. 2874-50 (R-42) and Civil Action No. 2158-52 (R -45). Both were received in evidence, and the defendant's case was rested (R-45).

The trial Court held that it was bound by the findings of fact, conclusions of law, and judgments entered in the two prior actions, the same having been pleaded by the defendant wife in her answer, introduced in evidence at trial, and relied upon as her defense to this action (J.A. 17 and 18). The Court also held that plaintiff had not sustained his burden of proof. The action was dismissed (J.A. 18).

SUMMARY OF ARGUMENT

Desertion and voluntary separation cannot exist concurrently at the same time and during the same period of years. The appellant was bound by the two prior final adjudications of the identical issue here presented, that his desertion of his wife on June 2, 1948, had continued to exist, without interruption, as of April 28, 1952, and again as of November 2, 1953.

ARGUMENT

Desertion and Voluntary Separation Cannot Exist Concurrently

The three actions here material between these parties were brought, in each case, under Title 16, Section 403, of the District of Columbia Code of Laws, which provides in part for the granting of a limited divorce or an absolute divorce on the grounds of "desertion for two years" and for "voluntary separation from bed and board for five consecutive years without cohabitation", among others.

Appellee would agree with the appellant's contention that both could exist concurrently, if the statute did not contain the word "voluntary", and if a mere separation for five years under any conditions was all that is required.

Desertion, however, is a wilful separation from one's spouse without justification either by the consent of the other spouse or by the wrongful conduct of the other spouse, with the intention of not resuming cohabitation. "Voluntary" separation, in contrast, requires that the separation be with the consent, express or implied, of both parties. The decisions of this Court over the years have made that distinction as to "consent" clearly and consistently.

Desertion Exists Only Without Consent

If a wife leaves with her husband's consent, such leaving does not amount to wilful desertion, within the statute authorizing divorce for such desertion. Smithson v. Smithson, 7 Mackey (18 D.C.) 227.

A divorce will not be granted for desertion, where the separation was by agreement of the parties or, if the party complaining later consented to or acquiesced in such separation. Secor v. Secor, 1 MacArthur (8 D.C.) 630.

In Hitchcock v. Hitchcock, 15 App. D.C. 81, it was stated as a necessary element that the deserted husband not have procured, consented to, or connived at the separation.

In Miller v. Miller, 72 App. D.C. 348, this Court stated that a husband is guilty of "desertion" if he lives apart from his wife without her consent, unless the wife has been guilty of acts which would justify a divorce.

In Parks v. Parks, 68 App. D.C. 363, this Court considered the question of whether the separation between those parties was a desertion or a voluntary separation. It held that the execution of a separation agreement after the original desertion did not, ipso facto, convert the desertion into a voluntary separation, but was merely one of all of the facts to be weighed in reaching a determination. The following quotation from page 365 is believed to be apt:

" The important consideration is whether the separation of the parties was consented to or acquiesced in by the innocent party, who except for such consent or acquiescence would have been privileged to secure a divorce upon the ground of desertion"

Voluntary Separation Requires Express Or Implied Consent

A divorce on the ground of voluntary separation for five years has been held unauthorized if either party does not voluntarily and continuously acquiesce in the separation during the full five years, even though the separation was originally voluntary on both sides. Bowers v. Bowers, 79 U.S. App. D.C. 146.

For a divorce under the voluntary separation statute, the plaintiff must establish that the separation was voluntary at the outset, or that the defendant's silent acquiescence made the separation voluntary. Butler v. Butler, 81 U.S. App. D.C. 26.

It is sufficient for an absolute divorce on the ground of voluntary separation for five years, if the deserted party, thereafter affirmatively

consent or silently acquiesce for the required period. But, if either party does not voluntarily and continuously acquiesce in the separation during five years, the divorce is not authorized, even though the separation was originally voluntary on both sides.

The district court may put a legal end to marriages which no longer exist in fact only in those cases where separation has been continuously voluntary on the part of both spouses for the statutory period. Martin v. Martin, 82 U.S. App. D.C. 40.

Marriages which, because of long separation have ceased in fact to exist, may, for that reason, be legally ended only where separation has been continuously voluntary on the part of both parties for the statutory period. Roberts v. Roberts, 95 U.S. App. D.C. 382.

The Buford Decision

Appellant, at page 6 of his brief, cites the case of Buford v. Buford, 81 U.S. App. D.C. 169, as enunciating the principle that "Where a separation has continued more than five years and neither party has tried to end it, a divorce should be granted." This Court reversed the lower court's refusal to give the husband a divorce on five years voluntary separation, because the court below felt that the husband's bigamous marriage to another woman "put it beyond the power of the parties to say whether the separation was voluntary or not." This Court held that to be erroneous, and found that "there was ample evidence that the separation was voluntary and no evidence that it was not."

Again, the question was whether the separation was with or without consent, express or implied.

The Second Parks Case Distinguished

Appellant relies most heavily, if not completely, for support of his unusual theory that voluntary separation and desertion can exist concurrently, upon Parks v. Parks, 73 App. D.C. 93.

To analyze and distinguish that decision, the material facts and dates found in that opinion and in the first decision, Parks v. Parks, 68 App. D.C. 363, should be set forth:

- | | | |
|-------------------|---|---|
| April 18, 1932 | - | Mr. Parks deserted his wife. |
| November 25, 1932 | - | Mr. and Mrs. Parks executed separation agreement |
| April 14, 1934 | - | Mrs. Parks sued for limited divorce on the ground of desertion. |
| May 8, 1935 | - | Mrs. Parks awarded decree of limited divorce on the ground of desertion. |
| August 7, 1935 | - | Present divorce statute became effective. |
| May 16, 1938 | - | Mr. Parks sued for absolute divorce on ground of five years voluntary separation. |

It therefore is seen that Mr. Parks contended that the voluntary separation had existed, at least, from May 16, 1933 until May 16, 1938. The decision turned on the question of whether the separation had been voluntary for five consecutive years prior to suit. It was pointed out that the separation had existed for six years prior to suit (five and one-half of them since the execution of the separation agreement). It was held after weighing all of the facts that the separation had been voluntary for more than five years; that the defendant wife's "silent acquiescence" made the separation "voluntary, in the statutory sense, within less than a year after it began, and therefore more than five years before the plaintiff filed this suit."

Appellee must point out that in the present case no separation agreement has ever been executed between these parties.

The crucial point, however, is that in the first Parks case it was sufficient under the statute then in effect that Mr. Parks had deserted her. That alone entitled her to a limited divorce. There was no requirement

then, and indeed no finding in the entire case, that the desertion had continued any specified length of time. In the second appeal, this Court found that the desertion ended within less than a year after it began, and that the separation was thereafter voluntary.

Appellee strongly urges that, in contrast, here the length and continued existence of the desertion of appellee by appellant has twice been adjudicated by decisions which are final and binding. Moreover, here the wife specifically pleaded these former adjudications in this action, and relied entirely upon them and the doctrine of res judicata, at the trial below. Mrs. Parks did not do so, nor could she have done so, because in her limited divorce action it was merely adjudicated that her husband deserted her on April 18, 1932. That was all that the statute then in effect required. Apparently because of that fact, counsel for Mrs. Parks did not even mention the question of res judicata in her brief.

In any event, it could not have been argued in that case that there had been a prior final determination that any of the period of the five years, alleged by Mr. Parks to have constituted voluntary separation (May 16, 1933 to May 16, 1938), was in fact a period of desertion. In contrast, in the present case, appellee relied upon one determination that the desertion still continued on April 28, 1952, and a second determination that the desertion still continued on November 2, 1953. Appellant's complaint was filed in this cause only fifteen days after the last determination.

Res Judicata And The Gill Case

The appellee relies upon the decision of this Court in Gill v. Gill, 79 U.S. App. D.C. 357. The following rule from that case, page 359, clearly required the conclusions and judgment entered in this case by the trial court:

"Where a judgment for maintenance has been entered, without findings and in the absence of a transcript of the evidence, as in the present case, the trial judge may not, in a subsequent action between the same parties, reject as unproved any facts pleaded or grounds alleged which if proved, had any reasonable tendency to establish the conclusion of the trial judge in the earlier case, or to support the judgment entered. On the contrary, under the familiar rule that the earlier judgment is *res judicata*, on the points and matters in issue and adjudicated in the first suit, the earlier judgment in the present case is a finality as to every matter which was offered and received to sustain or defeat Mrs. Gill's case. 'Even if the . . . suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties . . . be taken as conclusively established, so long as the judgment in the first suit remains unmodified.' (*Italics supplied*)"

CONCLUSION

Appellee urges that this Court has consistently held (1) that the distinctive element of "consent", express or implied, must be shown to exist to establish a voluntary separation for five years; and, in contrast, (2) that to establish desertion, it must be shown that the separation complained of is without or against the "consent" of the deserted party. The two grounds for divorce, having been shown to require the presence in one case, and the absence in the other case, of the same element, could not possibly exist concurrently. The two causes of action, therefore, at least in this case with its prior adjudications, are mutually exclusive.

The trial court correctly held that the prior adjudications were final, binding upon the court and both parties, and required the dismissal of appellant's complaint. Clearly that ruling should be affirmed.

Respectfully submitted,

James K. Hughes
John Alexander
630 Woodward Building
Washington 5, D. C.
Attorneys for Appellee.

